



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

September 17, 2003

Ms. Rebecca F. Vann
Assistant County Attorney
Henderson County
County Courthouse, Room 100
Athens, Texas 75751

OR2003-6544

Dear Ms. Vann:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 187776.

The Henderson County Judge (the "county judge") and the Henderson County Sheriff's Department (the "department") received a request for records of persons housed in the Henderson County Jail while awaiting their mental health commitment hearing or transfer to Rusk or Terrell State Hospitals, and a copy of policies and procedures regarding the detainment or arrest of persons with mental illness. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that exhibits 5 and 11 are not subject to disclosure under chapter 552 of the Government Code. Chapter 552 applies to information maintained by a governmental body. The definition of governmental body "does not include the judiciary." *See* Gov't Code § 552.003(1)(B). Thus, chapter 552 is not applicable to judicial records. *See also Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ); Attorney General Opinion DM-166 (1992); Open Records Decision No. 618 at 4 (1993). Because this request for information is directed, in part, to the county judge, and we understand the information in exhibits 5 and 11 to be judicial records, the county judge is not required to comply with this request under chapter 552 of the Government Code. *See* Gov't Code § 552.0035 (access to information maintained by or for judiciary is governed by rules adopted by Supreme Court); Tex. R. Jud. Admin. 12 (public access to judicial records); Attorney General Opinion DM-166 at 1 (chapter 552 neither authorizes information held by judiciary to be withheld nor requires it to be disclosed). As chapter 552 is not applicable to exhibits 5 and 11, we need not address your claim under section 552.103 in relation to this information.

We note, however, that certain judicial records may be open to the public under sources of law other than chapter 552. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992) (documents filed with a court are generally considered to be public); Attorney General Opinion DM-166 at 3 (public has general right to inspect and copy judicial records); Open Records Decision No. 618 at 4 (Texas courts have recognized common-law right of public to inspect and copy records of judiciary); Local Gov't Code § 191.006 (records belonging to office of county clerk shall be open to public unless access restricted by law or court order).

Additionally, we note that exhibit 10, which appears to consist of department records, includes a court-filed document that is expressly public under section 552.022 of the Government Code and may not be withheld unless confidential under other law. *See Gov't Code § 552.022(a)(17)*. Sections 552.103 and 552.108 are discretionary exceptions that protect a governmental body's interests and may be waived. As such, sections 552.103 and 552.108 are not other law that make information confidential for the purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); Open Records Decision No. 177 (1977) (law enforcement exception may be waived by governmental body); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the court-filed document in exhibit 10 may not be withheld pursuant to section 552.103 or section 552.108. You also raise section 552.101 as a possible exception to disclosure. This exception constitutes other law for purposes of section 552.022, and therefore we will consider its applicability to the court-filed document in exhibit 10.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You contend that the court-filed document in exhibit 10 is protected by the common law and constitutional rights to privacy, which are encompassed by section 552.101. The doctrine of common law privacy protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family

relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy and includes only information that concerns the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Having reviewed the court document in exhibit 10, we find that the marked information in this document is protected by common law privacy and must be withheld under section 552.101.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that exhibits 1, 2 and 3 relate to pending criminal cases. Based upon this representation, we conclude that the release of exhibits 1, 2, and 3 would interfere with the detection, investigation, or prosecution of crime, and therefore, that section 552.108(a)(1) is applicable to these exhibits. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You state that exhibits 6, 7, 8, 9, and 10 relate to investigations that did not result in conviction or deferred adjudication. Therefore, we agree that section 552.108(a)(2) is applicable to exhibits 6, 7, 8, 9, and 10.

Section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle*. 531 S.W.2d at 185. Basic information includes identifying information about an arrestee. Exhibits 6 through 10 concern individuals who were taken into protective custody due to their mental health status. Basic information that identifies these individuals is excepted from disclosure under section 552.101 in conjunction with the common law right to privacy, because such identifying information is highly intimate and embarrassing and is not of legitimate concern to the public. We have marked this information in exhibits 6 through 10 accordingly. The remaining basic information in exhibits 6 through 10 must be released. Exhibits 1 through 3 concern the arrest of individuals for alleged crimes. Therefore, the basic information in these exhibits, including information identifying the arrestees, is of legitimate

concern to the public. For this reason, all basic information in exhibits 1 through 3 must be released. You may withhold the remainder of exhibits 1 through 3 and 6 through 10 from disclosure based on section 552.108.¹

You claim that exhibits 4 and 12 are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). You have not demonstrated that exhibit 4 or exhibit 12 relates to pending or reasonably anticipated litigation to which the department is a party. Furthermore, we have not received a representation from an entity with a litigation interest that it seeks to withhold exhibit 4 or exhibit 12 from disclosure under section 552.103. Therefore, we conclude that exhibits 4 and 12 are not excepted from disclosure under section 552.103. As you have claimed no other exceptions to disclosure for exhibit 12, exhibit 12 must be released.

Exhibit 4 does, however, contain information that is excepted from disclosure under sections 552.101 and 552.130 of the Government Code. As discussed above, section 552.101

¹As we are able to resolve this matter under section 552.108, we do not address your additional arguments against the disclosure of this information. We note that basic information held to be public in *Houston Chronicle* is not generally excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).

encompasses the doctrine of common law privacy. We have marked information in exhibit 4 that is protected by common law privacy and must be withheld under section 552.101.

Exhibit 4 also contains medical and mental health records. Access to medical records is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the records in exhibit 4 that are subject to the MPA.

Section 611.002 of the Health and Safety Code applies to "[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional." *See also* Health & Safety Code § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). We have marked the mental health records in exhibit 4 that are confidential under section 611.002 and may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health & Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045.

Exhibit 4 also contains a social security number. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers in exhibit 4 is

confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, exhibit 4 contains information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

We have marked the Texas driver's license number and license plate number in exhibit 4 that you must withhold from under section 552.130.

In summary, exhibits 5 and 11 are not subject to disclosure under the Act. With the exception of the marked information that is protected by common law privacy, the court document in exhibit 10 must be released. Basic information in exhibits 1 through 3 must be released. Basic information that has not been marked as protected by common law privacy in exhibits 6 through 10 must be released. With the exception of basic information, exhibits 1 through 3 and 6 through 10 may be withheld under section 552.108. The following marked information in exhibit 4 must be withheld: information protected by common law privacy, medical records, mental health records, a driver's license number and license plate number. The social security number in exhibit 4 may be excepted from disclosure. The remaining information in exhibit 4 must be released. Exhibit 12 must be released in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Karen Hattaway".

Karen Hattaway
Assistant Attorney General
Open Records Division

KEH/sdk

Ref: ID# 187776

Enc: Submitted documents

c: Ms. Terri G. Cawley
Advocacy, Incorporated
211 West Tyler Street, Suite A
Longview, Texas 75601
(w/o enclosures)